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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MASOUD KOSHKI, Plaintiff and Appellant, v. TRANZON ASSET STRATEGIES et al., Defendants and Respondents.	B201660 (Los Angeles County Super. Ct. No. BC348526)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.

Law Offices of George Baltaxe and George Baltaxe for Plaintiff and Appellant.

Gregory C. Pyfrom & Associates, Gregory C. Pyfrom, Anne Singer-Johnson, and Ira Cohen for Defendants and Respondents.

Plaintiff, Masoud Koshki, appeals from the summary judgment granted to defendants Tranzon Asset Strategies LLC (Tranzon), Tranzon LLC, several of Tranzon's employees, and two insurance companies that bonded Tranzon. Plaintiff's two causes of action sought damages for alleged statutory violations under Civil Code sections 1812.600-1812.609[1] and negligent misrepresentation, deriving from Tranzon's overstatement, in advertising, of the square footage of a commercial building that plaintiff purchased via Tranzon at auction.

We affirm the summary judgment. The sale in question was not subject to the regulatory provisions of section 1812.600 et seq., and defendants established that plaintiff did not reasonably rely on the questioned representations.

FACTS

Plaintiff's first amended complaint alleged that on April 13, 2005, plaintiff purchased, at public auction, a commercial building in Commerce (property), for $780,000 plus expenses. Tranzon conducted the auction, through defendant Michael Walters, one of its principals. In advertisements, Tranzon represented to potential bidders that the property contained 8,899 square feet. In fact, its size was 7,218 square feet, 21 percent smaller. "Immediately after plaintiff purchased the property, it was appraised for $570,000." Plaintiff thus suffered damages of at least $210,000, plus costs incurred in financing the property. Plaintiff also claimed entitlement to attorney fees under section 1812.600, subdivision (m), as well as punitive damages.

Incorporating these allegations into two causes of action, plaintiff alleged first that by not truthfully describing the property before selling it at auction, defendants violated section 1812.600 et seq. In a second cause, for misrepresentation, plaintiff alleged defendants had mailed and faxed to plaintiff, respectively, two advertisements for the sale of the property, both stating its size was 8,899 square feet. Plaintiff attached copies of them. One, a postcard, stated, inter alia, "Property sold 'as is, where is'," and

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[1] Undesignated section references are to the Civil Code.

"Information obtained from sources deemed to be reliable, but accuracy of information is not guaranteed. All information must be independently verified by prospective purchasers." The second, allegedly faxed "advertisement" was a summary description of the property, which twice used the 8,899 square feet number. Plaintiff alleged that defendants had either misrepresented the size of the property without knowing the facts, or had known the true facts but did not reveal them. Plaintiffs further alleged that in reliance on the representations he had purchased the property, for more than it was worth. The complaint also contained another fraud cause, which apparently was disposed of by demurrer, and a claim on the insurers' bonds. Plaintiff expressly did not rely on these two causes when opposing defendants' motion for summary judgment.

After answering, defendants moved for summary judgment. The motion advanced several reasons why plaintiff's misrepresentation claims lacked merit, including that defendants lacked knowledge of falsity, that numerous disclaimers precluded justifiable reliance by plaintiff, and that plaintiff had released defendants from liability. In a declaration, defendant Walters stated that plaintiff was represented at the August 13, 2005 auction by an agent, Farzad Agavian. He successfully bid for the property, and on the same day signed a purchase contract, to which plaintiff subsequently became a principal party. The contract, a copy of which was attached, stated that the property was sold "as-is," without any representations, and that seller and its agents would not be responsible for any relief based on the property's nonconformance with "any specific standard or expectation."

Walters's declaration also included copies of other transactional documents. He declared that a "bidder registration form" was a prerequisite to bidding. Signed and agreed to by Agavian, it disclaimed any liability by the seller or auctioneer for inaccuracies, encouraged inspection of the property, and disclaimed liability just as did the purchase contract. Agavian also initialed, as requested, a statement that he understood the property was being sold as is. Similar provisions, including more extensive disclaimers, were included in the "bidder information packet' (BIP). Its description of the property stated a size of 8,899 square feet, "based on information

provided by Los Angeles County Assessor's Office." Assessor's information, copied from a website, stated the separate square footage, totaling 8,899, of two improvements on the property, one of which was stated as having been built in 1955. Walters declared that Agavian had executed the BIP too, although the copy he provided contained no place for signature.

Finally, Walters recited that following the sale, Tranzon had agreed to relinquish $20,000 of its commission, which was payable by plaintiff. An August 8, 2005 amendment to the escrow instructions stated that, in consideration for this credit, plaintiff and the seller released Tranzon from all claims, damages, losses, and liabilities, whether known or unknown, which either of them had or might have against Tranzon. Walters declared that plaintiff had executed this amendment; the copy attached did not contain his signature.

In his opposition, plaintiff stated that he was relying on his first two causes of action, under section 1812.600 et seq. and for negligent misrepresentation. He cited several of those sections, which he claimed defendants' inaccurate advertisement of the property violated. As regards the release, plaintiff argued it was given only to Tranzon, and it did not apply because of section 1542, as he had not known of the shortfall in footage when he signed the release. Plaintiff also cited section 1812.609, which prohibits waiver of section 1812.600 et seq.

In his declaration, plaintiff stated he had received the two advertisements for the property, and from the postcard he became interested in buying it. Plaintiff had his business partner Agavian attend the auction, and plaintiff authorized him to pay what he did because plaintiff believed the property contained 8,889 square feet. He relied on the advertisement, and would not have authorized that bid amount had he known the property was only 7,218 square feet. When plaintiff signed the August release, he did not know that the property's size did not conform to the advertisement. He had been unable to see or measure the upper floor, which was bolted shut. Plaintiff would not have signed the release had he known of the size discrepancy. Moreover, he said, the release concerned

only the reduction of commission. Plaintiff learned of the property's true size after close of escrow, from an appraiser engaged by a lender.

Agavian described his experience at the auction in a declaration. He stated the property was available for inspection from 9:30 to 11:30 a.m.; arriving at 10:00, he had inspected it for about 20 minutes. At about 11:00 to 11:15, he was asked to sign the bidder registration form. After doing so, he was handed the BIP. The auction began a few minutes later, and Agavian was the successful bidder. He was then unaware of the true square footage.

Plaintiff included deposition testimony by an individual who had been involved in refurbishing the property before its sale. He stated that the property had been "completely remodeled." Plaintiff also cited *Spaulding v. O'Connor* (1927) 87 Cal.App. 82, a case concerning liability of an auctioneer and a real estate broker for misrepresenting the size of real estate purchased at auction.

In their reply papers, defendants asserted that "the viability and enforceability" of their disclaimers of accuracy "are the crux of the entire case." They also urged that there had been no false representation because the BIP stated that the 8,899 figure came from assessor records, which was true. Walters declared he had obtained the information from the assessor's website, and he considered the assessor's office a reliable source, because of its avowed methods – including property measurement – and from his prior experience. With respect to availability of the property for inspection, Walters stated that in addition the auction day inspection, "if people call and ask, they can get in to see." Defendants included a deposition excerpt of Agavian, who testified, as had plaintiff, that he did not read the disclaimer on the postcard advertisement. In the BIP, he had read only the project description with square footage, but not the statement that it was based on assessor information. An employee at the auction also had told him the size was 8,899 square feet.

The trial court granted the motion for summary judgment. The record on appeal does not contain a statement of the court's reasons, under Code of Civil Procedure section 437c, subdivision (g). However, the judgment, prepared by defendants, recites

that as to both causes of action, the court found that "Plaintiff was put on notice that the property size was taken from L.A. County Assessor Records and that Tranzon was not responsible for any information that may have been inaccurate as shown in all documentary evidence submitted to this court."

DISCUSSION

We review the grant of summary judgment de novo. (*Merrill v. Navagar, Inc.* (2001) 26 Cal.4th 465, 476; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*.) In so doing, we follow rules prescribed by Code of Civil Procedure section 437c, as explicated in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*). To obtain summary judgment, defendants had to show either that one or more elements of plaintiff's claims could not be established, or that there existed a complete affirmative defense to those claims. (Code Civ. Proc., § 437c, subds. (a), (o)(1), (2), (p)(2).) Defendants bore the burden of persuading the court to this effect. (*Aguilar*, at p. 850.) In determining whether defendants met their burden, we view the evidence in the light most favorable to plaintiff, the nonmoving party, liberally construing his evidence while strictly scrutinizing defendants'. (*Id.* at p. 856; *Saelzler, supra*, 25 Cal.4th at p. 768.)

Plaintiff's first cause of action sought damages for a violation of section 1812.600 et seq. In particular, plaintiff claimed that defendants' mailed advertisement violated section 1812.608, subdivision (c), which makes it a violation to "Place or use any misleading or untruthful advertising or make any substantial misrepresentation in conducting auctioneering business. . . . "

This cause of action was legally unfounded, because section 1812.600 et seq. do not apply to real property auctions. The statutes' duties and defined violations all arise, directly or by incorporation, from the definition of "auction" in section 1812.601, subdivision (b). That definition involves the purchase of "goods," which are defined in subdivision (g) as personal property. And subdivision (b)(2) of section 1812.601 specifically states that "auction" does not include "*A sale of real estate . . . .*" (Italics

added.) This definition also forms part of the statutes' definitions of auction company and auctioneer (§ 1812, subds. (c), (d)). Accordingly, none of the provisions on which plaintiff would rely extends to the real estate auction on which this case is grounded. Plaintiff's first cause of action, for violation of section 1812.600 et seq., was subject to summary adjudication on this basis.[2]

Plaintiff's remaining cause of action was for misrepresentation, of the size of the property, in the initial advertisements. Plaintiff has characterized the misrepresentation as negligent, not intentional, and we so treat his claim. The elements of a cause of action for negligent misrepresentation are misrepresentation of a fact, without reasonable grounds for believing it true, with intent to induce reliance, justifiable reliance by the claimant, and damages. (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962; see *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts § 818, p. 1181.) The evidence before the trial court fatally disproved at least one of these elements, reasonable reliance by plaintiff.

Plaintiff's reliance on defendants' statement of the property's square footage was not reasonable because throughout the sales process that representation was heavily qualified and conditioned. Plaintiff testified that the initial postcard advertisement both drew his interest to the property and caused him to bid the amount that he did, and thus buy it. Although plaintiff is correct that the postcard stated, "8,899sf Building" in large type, inescapably visible and legible below were the warnings, "Information obtained from sources deemed to be reliable, but accuracy of information is not guaranteed. *All* information must be independently verified by prospective purchasers." (Italics added.)

These disclaimers were repeated and amplified in the documentation defendants furnished bidders on the day of the auction. In both contexts, they diminished if not

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[2] Because the parties' original briefs did not recognize the inapplicability of section 1812.600 et seq., we requested supplemental briefs on the matter. (Cf. Code Civ. Proc., § 437c, subd. (m)(2).) In his response, plaintiff conceded that the statutes did not apply.

negated the representation of square footage, and also rendered it unreasonable to rely on that representation. A statement of a building's size by a vending agent who simultaneously affirms that it is not guaranteeing that information and that a purchaser must verify it independently is not a proper basis for deciding to expend over $700,000 on the structure.

The fallacy of plaintiff's reliance is illustrated by *Pacesetter Homes, Inc. v. Brodkin* (1970) 5 Cal.App.3d 206. There a real estate investor purchased as rental property two duplexes in a new subdivision, after the developer's salesmen told him that the units in the duplexes would rent for $170 to $225, depending on size. The salesmen also told him, "'If you receive the rents as we contemplate, it will be an excellent investment and there shouldn't be any difficulty in renting them.'" (*Id.* at p. 209.) The buyer experienced difficulty renting the duplexes, and they went into foreclosure. As of trial, rent rates had not attained the salesmen's numbers. The Court of Appeal agreed with the trial court's finding that the buyer could not have reasonably relied on the seller's statements about rentals. They were "hedged with significant qualifications," in light of which the buyer could not justifiably rely on them as to what rent he would receive. (*Id.* at p. 213.)

Plaintiff relies on *Spaulding v. O'Connor, supra,* 87 Cal.App. 82, which affirmed a fraud judgment against an auctioneer and others who had misrepresented the size of real property. The decision concerns the liability of an agent, and it discusses misrepresentations made without any knowledge supporting a belief in the statement. It does not address the factor here decisive.

Apart from any other deficiencies of plaintiff's negligent misrepresentation cause of action, plaintiff's lack of justifiable reliance on defendants' heavily qualified statement rendered summary adjudication of that cause proper.

DISPOSITION

The judgment is affirmed.

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COOPER, P. J.

We concur:

RUBIN, J.

BIGELOW, J.